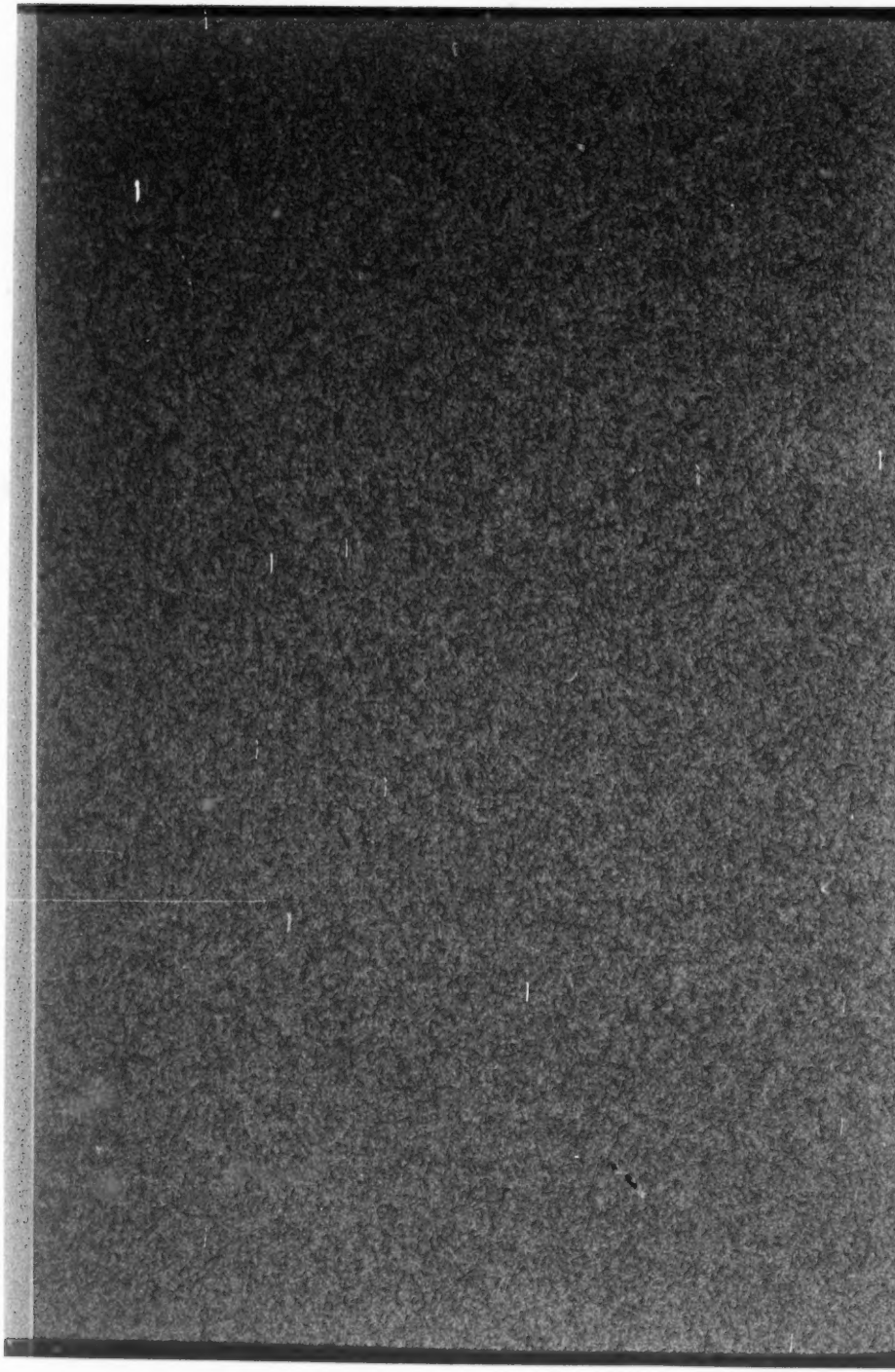

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 701

ANGELO QUERCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The petition in the instant case presents the question whether certain comments on the defendant's testimony made by the District Judge in the course of his charge to the jury constituted reversible error.

Petitioner concedes that in a Federal court the trial judge may express his opinion upon the evidence and may assist the jury in its deliberations by comments upon the testimony, but it is asserted that the District Judge in this case abused this important privilege.

162822—33

In the instant case District Judge Lowell, in commenting upon the defendant's testimony, said in the course of his charge to the jury (R. 16):

> You may have noticed, Mr. Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.
>
> Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.

Petitioner contends that this comment exceeded proper bounds and constituted prejudicial error because it was founded upon facts not in evidence, and it is alleged to be a distortion of the testimony that was before the jury for its consideration. Furthermore, petitioner asserts that because of the great weight properly given by a jury to the comments of the judge on the evidence, the comment was so prejudicial to the defendant as to amount almost to a directed verdict of guilty.

The majority of the court below dismissed petitioner's objection to this portion of the charge because it considered that the jury would naturally disregard a comment of this kind and could not have taken it seriously. (R. 23.) The dissenting judge considered that the comment was so improper

as to constitute prejudicial error. (R. 24.) It is of the utmost importance that Federal courts should continue to enjoy the privilege of making proper comments upon evidence for the guidance of juries. It is equally important that this privilege should not be abused. As a serious question of abuse of the privilege is raised by petitioner and as a difference of opinion upon the subject is disclosed by the opinions below, we think that the question presented is one of sufficient importance to merit review by this Court and we do not oppose the granting of the petition for a writ of certiorari, limited to the question whether the foregoing comment of the trial judge upon the testimony constituted prejudicial error.

Attention should, however, be called to the fact that the testimony of the petitioner to which the comment of the trial judge related was not included in the bill of exceptions, and the court below was of the opinion that the petitioner's testimony might have clearly deserved the characterization given to it in the charge to the jury. (R. 23.)

The only other rulings complained of were the denial of defendant's motion for a directed verdict of not guilty; the instruction of the court that if the jury believed the evidence for the Government, they could find the defendant guilty under the indictment; and the refusal of certain requests for rulings.

The testimony for the Government, which was very brief (R. 3–13), was clearly sufficient, as both

courts found, to sustain the verdict of guilty. The jury was instructed upon the question of reasonable doubt and the presumption of innocence (R. 15–16), and then the court told the jury that if they believed the evidence for the Government, they might find the defendant guilty under the indictment (R. 16). Thus qualified by a statement of the rules as to reasonable doubt and presumption of innocence, the instruction to find guilt if the testimony was believed was, as the court below concluded (R. 22), a correct statement of the law.

The requests for rulings (R. 14) were in effect requests for peremptory instructions to acquit because of the alleged failure of the Government to prove necessary elements of the crimes charged, and the exceptions to the court's refusal to rule as requested added nothing to the exception to the denial of the defendant's motion for a directed verdict. Both courts below considered the evidence amply sufficient to support the verdict.

CONCLUSION

We do not oppose the granting of the writ of certiorari, but suggest that if certiorari is granted, review be limited to the question whether the comment of the trial judge upon the testimony constituted prejudicial error.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

MARCH, 1933.

U. S. GOVERNMENT PRINTING OFFICE : 1933